RE ROSLI ABDUL KADIR; EX P BANK KERJASAMA RAKYAT MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[BANKRUPTCY NO: D5-29-5105-2005]
16 JUNE 2008

BANKRUPTCY: *Practice and procedure - Stay of proceedings - Principles applicable - Test to warrant court's discretion to grant or refuse application - 'Sufficient reason' or 'special circumstances' - Bankruptcy Act 1967, s. 97*

This was an appeal to the judge in chambers against the decision of the senior assistant registrar dismissing the judgment debtor's application pursuant to s. 97 of the Bankruptcy Act 1967 ('Act') for a stay of bankruptcy proceedings, pending disposal of the judgment debtor's application to set aside a judgment in default of appearance in the Sessions Court (the judgment formed the basis of the bankruptcy petition in this case). The preliminary issue was whether the test to warrant the court's discretion to grant or refuse the application under s. 97 of the Act was for the judgment debtor to show 'sufficient reason' or 'special circumstances'.

Held (allowing the appeal):

(1) The test of 'sufficient reason' is distinct from the test of 'special circumstances', and the principles applicable to a stay of execution and a stay of bankruptcy proceedings are not the same. The test to warrant the court's discretion to grant or refuse the application is for the judgment debtor to show 'sufficient reason' and not 'special circumstances'. Thus, the judgment debtor's burden to prove 'sufficient reason' is much lighter than to prove 'special circumstances'. *Re Chai Min Sin; ex p MBf Finance Bhd* (not foll). A *bona fide* application by the judgment debtor to set aside a judgment in default at the Sessions Court is also 'sufficient reason' for the purpose of s. 97 of the Bankruptcy Act 1967. In all the circumstances of this case, there was an application to set aside a default judgment; the grounds of the application to set aside the judgment were *bona fide*, on merit and had a real chance of success; the application to set aside the default judgment would be disposed off expeditiously; and if the judgment debtor became bankrupt, the application became nugatory.

These factors constituted sufficient reason to justify reversing the senior assistant registrar's decision and granting a stay of the bankruptcy proceedings, pending hearing and disposal of the judgment debtor's application to set aside the judgment in default in the Sessions Court. (paras 20, 21, 35 & 39)

[Order accordingly.]

Case(s) referred to:
Ex parte Heyworth In re Rhodes [1884] 14 QBD 49 ***(refd)***
Malayan Banking Bhd v. Datuk Lim Kheng Khim [1992] 3 CLJ 1616; [1992] 2 CLJ (Rep) 840 HC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
In re Yeatman [1880] 16 Ch D 283 ***(refd)***
Re Chai Min Sin; ex p MBF Finance Bhd [2004] 5 CLJ 272 HC ***(not foll)***
Re Flatau, Ex parte Scotch Whisky Distiller Ltd [1888] 22 QBD 83 ***(refd)***
Re Noble (a Bankrupt), Ex parte Bankrupt v. Official Receiver [1965] Ch 129 ***(refd)***
Re Russell, Ex parte Temperton [1893] 10 TLR 165 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 97
Subordinate Courts Rules 1980, O. 7 r. 1(1)

For the judgment debtor - Huzaini Hussin; M/s Huzaini Hussin & Assoc
For the judgment creditor - M/s Amir Ruhana, Khairuddin

Reported by Suresh Nathan

JUDGMENT

Ramly Ali J:

Introduction

[1] This is an appeal to the judge in chambers (encl. 29) against the decision of the senior assistant registrar on 27 February 2008 dismissing with costs the judgment debtor's application for a stay of bankruptcy proceeding pending disposal of the judgment debtor's application to set aside the judgment in default of appearance in the Session's Court, the judgment which form the basis of the bankruptcy petition in this case.

[2] The judgment debtor's application for the stay of the bankruptcy proceeding is made *vide* the summon in chambers dated 21 September 2007 (encl. 26) and is supported by the affidavit of the judgment debtor affirmed on 19 September 2007 (encl. 25). The judgment creditor by the affidavit in reply affirmed on 9 October 2007 (encl. 26A) apposed the application. The application is made pursuant to s. 97 of the Bankruptcy Act 1967.

Preliminary Issue: Whether The Test To Warrant The Court's Discretion To Grant Or Refuse The Application Under s. 97 Of The Bankruptcy Act 1967, Is For The Judgment Debtor To Show 'Sufficient Reason' Or 'Special Circumstance'

[3] Section 97 of the Bankruptcy Act 1967 the provision under which the application is made provides as follows:

> The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

[4] The judgment creditor in its affidavit (encl. 26A) contended that the application should not be allowed as the judgment debtor failed to show special circumstances in the judgment debtor's affidavit (encl. 25) to warrant the court's discretion to stay the bankruptcy proceeding.

[5] The 'special circumstances' test is an acceptable test in an application for a stay of execution usually pending appeal. This has been affirmed by the Federal Court in several cases which need not be cited here as this is a well accepted guiding principle in deciding whether a stay of execution of a judgment should be granted or not pending appeal against a judgment. Nevertheless the 'special circumstances' test is a creation of the courts and is not provided by the statutes. 'Special circumstances' are also referred to as 'special grounds' by certain courts.

[6] The test of 'special circumstances' or 'special grounds' is distinct from the test of 'sufficient reason' in its principle, legal meaning, weight to the test, degree of burden to be proved to satisfy the court and particular facts that need to be adduced to pass each test. Even the words 'special' and 'sufficient' are different in their ordinary meanings.

[7] Certainly, the weight and degree of burden to be proved to satisfy the court in 'special circumstances' test is higher than the 'sufficient reason' test and the weight and the degree of burden to be proved to satisfy the court in 'sufficient reason' test is lower than in the 'special circumstances' test. To quote the words of Abdul Hamid Mohamad JCA (as he then was) in *Ming Ann Holdings Sdn. Bhd. v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 CA:

> ... the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal)

[8] As such the degree that needs to be passed under the 'special circumstances' test is beyond the 'sufficient reason'.

[9] Cotton, LJ in an application for a stay of bankruptcy proceedings said in *In Re Yeatman* [1880] 16 Ch. D. 283:

> But a judgment had been obtained establishing the validity of the petitioning creditor's debt, and in my opinion, when that is so, and the judgment has not been reversed, the Registrar has power to proceed with the hearing of the petition, if in the exercise of his judicial discretion he thinks fit to do so. But if he is satisfied that a real appeal from a judgment is pending, he ought, in my opinion, as was done in the present case, to adjourn the hearing of the petition until after the appeal shall have been disposed of.

[10] In *Ex parte Heyworth In re Rhodes* [1884] 14 QBD 49, the English Court of Appeal decided that the pending of a *bona fide* appeal by the debtor against the judgment which gave arise to the debt fully justified the registrar in adjourning the petition generally with liberty to apply. In *Re Noble (a Bankrupt), Ex parte Bankrupt v. Official Receiver* [1965] Ch 129, CA the court said, *per curiam*, "Although the registrar has power to make a receiving order where the petitioner's debt is the subject of a pending appeal, he ought not to exercise that power pending the appeal if satisfied that the appeal is *bona fide*".

[11] In our local case of *Malayan Banking Bhd v. Datuk Lim Kheng Khim (2)* [1992] 3 CLJ 1616; [1992] 2 CLJ (Rep) 840, Abdul Hamid Mohamad JC (as he then was) exercised his Lordship's discretion to stay further bankruptcy proceeding until the appeal is heard, as some serious points of law have been raised in this proceedings which no doubt will be decided by the Supreme Court, on appeal.

[12] In the above example of cases presented above, the courts decided that a 'real appeal' or a '*bona fide* appeal' pending or 'serious points of law has been raised in appeal' are 'sufficient reason' to justify the order for the stay of the bankruptcy proceedings. If the 'special circumstances' test is applied in the above example of cases, none of the above said grounds will pass. 'Real appeal' or a '*bona fide* appeal' pending or 'serious points of law has been raised in appeal' are not special circumstances to warrant stay of execution under the 'special circumstances' test as defined by Abdul Hamid Mohamad JCA (as he then was) in *Ming Ann Holding*'s case *(supra)*. They are 'ordinary common and usual circumstances that go to the validity or corrections of the judgment (or merit of the appeal)'.

[13] The court is of the view that the test of 'special circumstances' and 'sufficient reason' are applicable in a separate distinct procedure and situation. The 'special circumstances' test is applicable in an application for a stay of execution of a judgment (normally in pending appeal). Execution of a judgment may be in many forms. For example, writ of distress, writ of seizure and sale, writ of possession, writ of delivery, judgment debtors summons, committal proceedings, garnishee proceedings, prohibitory orders, etc. and including bankruptcy petition. The application for a stay of execution is applied before the same court that gives the judgment. When the order for the stay of execution is granted by the same court that gives the judgment, the judgment creditor cannot proceed with any form of execution. If, for example, the judgment debtor applied for a stay of execution of the judgment in this case, before the Session's Court Judge, who gives the judgment in default, and if the application is granted, the judgment creditor cannot proceed with any form of execution pending disposal of the matter in issue. If the application is made for the stay of execution before the Session's Court Judge, the correct test will be 'special circumstances' and the order if granted, will restrain the judgment creditor from executing the judgment in any form of execution.

[14] On the otherhand, in an application for a stay of bankruptcy proceeding, the application is not made before the same court that gives the judgment but is applied before the bankruptcy court of which the bankruptcy petition is presented. The bankruptcy petition, if postponed, pending the disposal of the matter in issue, will not restrain the judgment creditor from proceeding with any

other numerous form of execution available to the judgment creditor, the example of which are stated above, to enforce the judgment obtained against the judgment debtor. Therefore, it will not be right to say that, by merely postponing the bankruptcy proceeding, the judgment creditor is deprived of the 'fruits' of its litigation, since there are many other 'fruits' (through various other forms of execution) available to the judgment creditor other than the bankruptcy proceeding. As such, 'special circumstances' ought not to be the test in an application for a stay of bankruptcy proceedings and should not be the meaning/interpretation of 'sufficient reason' as provided in s. 97 of the Bankruptcy Act 1967.

[15] The test of 'sufficient reason' is exclusively provided for in an application for a stay of bankruptcy proceeding whereas in an application for a stay of execution of a judgment, the stay is against all form of execution and the test should rightly be 'special circumstances'.

[16] It must be understood that the effect of an adjudication order and receiving order in a bankruptcy petition is distinct from the other form of execution. In other form of execution, if the judgment is for property or money, only the property or money is taken from the judgment debtor to satisfy the judgment. The effect, or the "punishment", if the judgment debtor becomes a bankrupt, is greater. Other than all his property shall vest in the Director General of Insolvency, he will be disqualified from holding the office of a member of Parliament, public office, certain positions in statutory bodies, practicing in certain professions, carrying on business alone or in partnership or by way of a company, maintaining any action without the previous sanction of the Director General of Insolvency, leaving Malaysia without permission of the Director General of Insolvency, receiving pension or other gratuity and enforcing his rights under certain legislation.

[17] Since the "punishment" under the bankruptcy petition is more serious, it would be correct to consider whether there is 'sufficient reason' to postpone the hearing of the bankruptcy petition, pending the disposal for any application to determine the validity of the judgment of which the bankruptcy petition is based, before the adjudication order and receiving order is made. To use the 'special circumstances' test is too harsh in an application to postpone or to stay the bankruptcy proceeding.

[18] The application to stay the bankruptcy petition is only an application to postpone the hearing of the bankruptcy petition, pending the disposal of the determination of the validity to the judgment of which the bankruptcy petition is founded. This is different from an application for a stay of execution of a judgment. If an order for a stay of execution of a judgment is granted by the court that gives the judgment, prior to the presentation of a bankruptcy petition, the judgment debtor may apply to set aside the bankruptcy petition on the ground that a stay of execution has been granted by the court which gives the judgment. But in an application for a stay of bankruptcy proceeding, the judgment debtor cannot apply to set aside the bankruptcy petition. Only the hearing of the bankruptcy petition stayed or is postponed under s. 97 of the Bankruptcy Act 1967.

[19] Furthermore, as said earlier, the 'special circumstances' test is the creation of the courts in an application for a stay of execution (normally in pending appeal) whereas the 'sufficient reason' test is the creation of a statute specifically provided by an Act of Parliament in an application for a stay of a bankruptcy petition. Therefore the intention of Parliament in this matter must prevail.

[20] Based on the above arguments, this court cannot agree with the decision in *Re Chai Min Sin; ex p MBF Finance Bhd* [2004] 5 CLJ 272, where in that case the court decided that "for a ground to be considered 'sufficient', it must also show 'special circumstances'." This court also cannot agree with the decision (in that case) that "the principles applicable to a 'stay of execution' and a 'stay of a bankruptcy proceeding' are the same." To this court the test of 'sufficient reason' is distinct from the test of 'special circumstances' and, the principles applicable to a stay of execution and a stay of a bankruptcy proceeding are not the same. The test for 'sufficient reason' is not so stringent as the test for 'special circumstances'.

[21] In conclusion on this issue, the court finds that the test to warrant the court's discretion to grant or refuse the application is for the judgment debtor to show 'sufficient reason' and not 'special circumstances'. Thus the judgment debtor's burden to prove 'sufficient reason' is much lighter than to prove 'special circumtances'.

Whether The Judgment Debtor Has Adduced Sufficient Reason For A Stay Of His Bankruptcy's Petition

[22] The next step is to consider whether the judgment debtor has adduced sufficient reason for stay of this bankruptcy proceeding pending the disposal of the judgment debtor's application to set aside the judgment in jefault in the Session's Court.

[23] The bankruptcy petition in this matter is founded on the judgment in default of appearance obtained against the judgment debtor on 18 January 2005. The judgment in default was obtained in the Kuala Lumpur Session's Court Summons No. 7-52A-26184-04). The judgment debtor has on 29 August 2007 filed the application in the Session's Court to set aside the judgment in default.

[24] The hearing of the said application to set aside the judgment in default is now fixed on 16 July 2008.

[25] The grounds of the Application to Set Aside the judgment in default are:

(a) the judgment in default is irregular and ought to be set aside *ex debito justiae*; and

(b) the judgment debtor has a defence of merit in the action.

[26] Based on paras. 4 to 9 and 19 of the affidavit in support of the application to set aside the judgment in default affirmed by the judgment debtor, the judgment debtor affirmed that:

(a) the judgment debtor has never been served with the summons and the judgment and the judgment debtor has never received the summons and the judgment;

(b) based on the affidavit of service and further affidavit in the action, the summons was served by Registered Post. The service of the Summons was not in accordance with Subordinate Courts Rules 1980. Order 7 r. 1(1) of the Subordinate Courts Rules 1980 provides that, "Subject to the provisions of any written law and these rules, a summons must be served personally on each defendant or by sending it by prepaid acknowledgment returned (AR) registered post

addressed to his last known address." As such the services of the summons and statement of claim (if any) in the action by way of only Registered Post is irregular and judgment in default obtained pursuant to the irregular service of summons is irregular.

(c) there were also no terms in any agreement between the judgment debtor and the plaintiff (the judgment creditor) agreeing that the summons can be served by Registered Post;

(d) further, the judgment debtor never receive the summons and was not aware of the return date which was fixed on 18 January 2005; and

(e) the Judgment Debtor did not have the opportunity to defend the claim before the Judgment was entered against him on 18 January 2005.

[27] These grounds of application on the issue of irregularity, to set aside the judgment in default obtained irregularly, are grounds of merit. And if the *bona fide* or merit or the chances of success of an application to set aside a judgment is an issue to constitute sufficient reason to postpone the hearing of the bankruptcy petition, pending the disposal of the application to set aside the judgment in default that was obtain irregularly, which is the foundation of this bankruptcy petition, then the court is of the view that the judgment debtor has shown '*sufficient reason*' to warrant stay of bankruptcy proceedings in this case.

[28] Based on paras. 10 to 14 and 20 of the affidavit in support of the application to set aside the judgment in default affirmed by the judgment debtor, the judgment debtor affirmed that:

(a) the first defendant (in that case) is not indebted to the plaintiff (the judgment creditor) the sum of RM141,461.16 together with the interest as claimed in the summons and statement of claims. And therefore, the judgment debtor is also not indebted to the plaintiff of the said sum and interest;

(b) as at 28 July 2004 the balance of the sale price acknowledged by the plaintiff (the judgment creditor) was RM28,533.35 (and not RM141,461.16 as claimed by the plaintiff (the judgment creditor) in the summons). A letter from the plaintiff (the judgment creditor) dated 28 July 2004 is exhibited to prove the same; and

(c) as at the date of which the said Affidavit was affirmed, all the sale price has been settled by way of assignment of payment by the Government of Malaysia to the plaintiff (the judgment creditor). A

[29] Further at paras. 13 to 17 of the affidavit in support of the application to set aside the judgment in default affirmed by the judgment debtor, in addition to the above said defence of merit, the judgment debtor affirmed another defence of merit that: B

(a) no interest shall be charged on the first defendant as the transaction between the plaintiff (the judgment creditor) and the first defendant is a transaction based on Islamic contract; and C

(b) the summons against the second defendant is void, pre-mature and not valid as no demand was made against the second defendant (the judgment creditor) who is sued as guarantor. D

[30] On the face of the affidavit in support of the application to set aside the judgment in default, the grounds of application on the issue of defence of merit to set aside the judgment in default are grounds of merit. And if *bona fide*, or merit, or the chances of success of an application to set aside a judgment is an issue to constitute sufficient reason to postpone the hearing of the bankruptcy petition, pending the disposal of the application to set aside the judgment in default which is the foundation of this bankruptcy petition, then the court is satisfied that the judgment debtor has shown 'sufficient reason' to warrant a stay of bankruptcy proceedings in this case. E F

[31] Eventhough, the judgment debtor has not specifically said in the judgment debtor's affidavit that he has 'sufficient reason', the phrase that he has sufficient reason is not important. It is meaningless if the judgment debtor said he has sufficient reason but the surrounding circumstances from the facts in the judgment debtor's affidavit does not show sufficient reason. This court must look into the circumstances of the case, to constitute sufficient reason, and not whether the judgment debtor mention or not the word 'sufficient reason' in his affidavit. G H I

[32] Abdul Hamid Mohamad JCA (as he then was) in *Ming Ann Holdings Sdn. Bhd. v. Danaharta Urus Sdn. Bhd* [2002] 3 CLJ 380, at p. 406 said, "I have said the function of the court is not to look for phrases used (as they are not 'passwords') but to look at the substance, consider the facts and the circumstances of the case in the light of the relevant factors that should be considered in the exercise of the discretion of the court and decide."

[33] It is quite right to say that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances or special grounds that justify a stay of execution to be granted by the court or there are specific provisions in any written law (such as s. 97 of the Bankruptcy Act 1967) to allow such stay. If there are such provisions of law to allow for such stay, then such law must be given effect to by the court provided all the necessary ingredients therein have been fulfilled. In the present case the judgment debtor has to prove "sufficient reason" for the stay of the proceedings. "Sufficient reason" is based on the facts if each particular case. It may not amount to "special circumstances". "Sufficient reason" may be ordinary or not special, but in the context of the circumstances of the particular case, it may be "sufficient" to justify the court to stay the proceeding under s. 97 of the Bankruptcy Act 1967.

[34] In *Re Yeatman* [1880] 16 Ch. D 283, the court decided that if the registrar is satisfied that a "real appeal" from a judgment is pending, he ought to adjourn the hearing of the petition until after the appeal shall have been disposed of. In *Ex parte Heyworth In re Rhodes* [1884] 14 QBD 49, the English Court of Appeal decided that the pending of a "*bona fide* appeal" by the debtor against the judgment which gave arise to the debt fully justified the registrar in adjourning the petition generally with liberty to apply. *In Re Noble (a Bankrupt), Ex parte Bankrupt v. Official Receiver* [1965] Ch 129, CA, the court said, *per curiam*, "Although the registrar has power to make a receiving order where the petitioner's debt is the subject of a pending appeal, he ought not to exercise that power pending the appeal if satisfied that the appeal is *bona fide*." In *Malayan Banking Bhd v. Datuk Lim Kheng Khim (2)* [1992] 3 CLJ 1616; [1992] 2 CLJ (Rep) 840, the court stayed further bankruptcy proceeding until the appeal is heard, as 'some serious points of law have been raised in the proceedings' which no doubt will be decided by the Supreme Court.

[35] Applying the same principle in the abovecited cases, the court is of the view that a *bona fide* application by the Judgment debtor to set aside the judgment in default at the Sessions Court (in the present case) is also "sufficient reason" for the purpose of s. 97 of the Bankruptcy Act 1967.

[36] Further, the application for a stay of the bankruptcy proceeding in the case is only for a short limited time ie, until the disposal of the judgment debtor's application to set aside the judgment in default. An application to set aside the default judgment in the Session's Court will be disposed off summarily by way of notice of application and affidavit hearing. This is different from the disposal of an appeal which may take months or years. In fact, the hearing of the application to set aside the judgment in default in question is already fixed on 16 July 2008. Normally a Session's Court Judge will be able to decide this kind of interlocutory application immediately after hearing submissions from the solicitors. Therefore, as far as the length of time for the postponement of the hearing of the bankruptcy petition is concerned, it will not be very long. It will be a very brief postponement.

[37] Further, if the hearing of the bankruptcy petition is proceeded, and the judgment debtor is adjudicated bankrupt, before his application to set aside the judgment in default is heard, his application will be nugatory. A bankrupt is incompetent to maintain any action, including filing and proceeding with the application to set aside the default judgment, without the previous sanction of the Director General of Insolvency. A person that needs to obtain a permission of another person to get a right to proceed with any legal action is equivalent to not having a legal right to take action at all. The Director General of Insolvency may give or may not give the sanction to a bankrupt. The mercy of the 'legal life' or 'the right to take legal action' of a bankrupt is in the hand of the Director General of Insolvency.

[38] Lord Esher, MR in *Re Flatau, Ex parte Scotch Whisky Distiller Ltd* [1888] 22 QBD 83, CA, said at p. 85, "when an appeal against a judgment has been lodged, the registrar must take into consideration the circumstances of the case and say whether in the particular case the lodging of the appeal calls upon him either to postpone the hearing of the petition, or to dismiss it, for he

has power to do that." It was decided by Lord Halsbury, in *Re Russell, Ex parte Temperton* [1893] 10 TLR 165, CA that in matters lying in the discretion of the registrar, the Court of Appeal will look at all the circumstances of the case and see whether the discretion has been wrongly exercised.

[39] The court finds that all the circumstances of this case, that there is an application to set aside a default judgment; that the grounds of the application to set aside the judgment are *bona fide*, on merit and has a real chances of success; that the application to set aside the default judgment will be disposed off expeditiously; and that if the judgment debtor become bankrupt the application becomes nugatory, are all sufficient reason to justify this court to reverse the decision of the senior assistant registrar and to grant a stay/postponement of the bankruptcy proceedings pending hearing and disposal of the judgment debtor's application to side aside the judgment in default in the Session's Court.

Conclusion

[40] Based on the above considerations, the court rules that the burden on the judgment debtor to prove "sufficient reason" as stipulated under s. 97 of the Bankruptcy Act 1967 is lighter or lesser than the burden to prove "special circumstances" applicable for stay of execution application.

[41] The court also rules that in the present case the judgment debtor has successful proved his case that he has "sufficient reason" to apply for a stay of proceeding under s. 97 of the Bankruptcy Act 1967.

[42] In the premise, the judgment debtor's appeal in the present case is allowed with costs. In coming to this conclusion, the court is aware that the judgment debtor may take advantage and abuse the order by taking too long a time to prosecute the application to set aside the default judgment at the Sessions Court. The judgment debtor may feel comfortable with this order and decides to unnecessarily delay the hearing of the application. If that happened, the interest of the judgment creditor will be badly prejudiced. Section 97 of the Bankruptcy Act 1967 allows the court to stay the proceedings of the bankruptcy petition either altogether or for a limited time, on such terms and subject to

conditions as the court thinks just. That being the case, in allowing the judgment debtor's appeal herein, the court imposes, a condition that the judgment creditor is at a liberty to apply to this court to allow the judgment creditor to proceed with this petition, if the judgment debtor's application to set aside the judgment in default at the Sessions Court is not duly prosecuted. (The same condition was imposed by the English Court of Appeal in the case of *Ex parte Heyworth In re Rhodes* [1884] 14 QBD 49.)